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ABSTRACT

The problems of formulating a legal definition of religion as used in the U.S. Constitution may be traced through the Supreme Court's interpretation of the word. According to the U.S. Constitution, religious tests cannot be required for any office or public trust under the central government. The Bill of Rights states that the national government may not establish a religion or prohibit its free exercise and the Fourteenth Amendment extends those restrictions to the states. Problems lie not only in interpreting the phrasing of the Constitution but also, particularly when deciding the status of conscientious objectors, what the term "religion" means. The Constitution has been interpreted as creating the separation of church and state and disallowing preferential status in law for religion or sponsoring religious activity. In "United States v. Seeger," the Supreme Court determined that the dictates of conscience are similar to deferring to the will of a traditional God. The Seeger case is a precedent which construes the definition of religion as the doctrinal, ethical, or ritualistic considerations to the ultimate concern in one's life, the belief in a faith to which all else is subordinated. (Author/KC)

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The Meaning of Religion: A Constitutional Perspective

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The Meaning of Religion: A Constitutional Perspective

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This discussion takes as its starting point the imprecision of the religious provisions of the First Amendment, and attempts to discover whether the decisions of the Supreme Court in establishment and free exercise cases supply the ingredients of a legal definition of religion.

The American system of church-state relations rests on very narrow grounds. The original Constitution provided only that religious tests may not be required for any office or public trust under the new central government, and the Bill of Rights added only that the national government may not establish religion or prohibit its free exercise. These latter restrictions were extended to state governments through the adoption of the Fourteenth Amendment.

These constitutional provisions have both the virtue of being compact and the vice of being so indefinite as to have limited value as guidelines. The operative word in all of them is religion; it is religion which may not be established nor restricted in its exercise nor made the content of a qualifying test for federal office.

Yet, for all its importance as the pivotal element in our church-state arrangement, the term, religion, was left undefined. It is possible that here as elsewhere in the deliberations of the Framers, ambiguity was the price of consensus, that the imprecision was intentional, and that the task of delimiting the term precisely was purposely left to later generations. Be that as it may, later generations were bequeathed no guidance by its authors concerning the exact meaning of the religion clause.

Fundamental to a search for meaning in the religion clause is a recognition that it is a provision of a political charter, not a tenet of theological faith. Its purpose is to promote the dogma and the ends of the American state. If the religious clause is a political rather than a theological formula, its meaning should be sought in the field of law rather than theology. Regardless of what theologians might read into the word, what religion means as an operative principle of government should be ascertained by those competent in the field of public law.

Because, in the familiar words of the Marbury v. Madison decision, "it is emphatically the province and duty of the judicial department to say what the law is," the courts, and especially the Supreme Court, are looked upon as authoritative interpreters of the constitutional text.

Search for a legal definition, that is a defining formula operative as law, raises numerous problems. When, for example, judges formulate definitions, are they attempting to describe parts of an abstract system of right and justice, or are they measuring human conduct by

some rule expressed in terms of a concrete social order? If in the defining process a value selection is made, is this done with due regard for or at the expense of other values? If quantitative elements enter the picture, e.g., if a choice is made on a continum, exactly where on the continum should the line be drawn? These and similar questions are common to the process of legal definition.

But the search for the legal meaning of religion in the Constitution is attended by special difficulties. The word "religion" stands alone, general and imprecise, in the First Amendment and has only such meaning as the judiciary has given it in a long series of complicated cases. When the Court asks how sincere a belief must be to be considered "religious" or what degree of state involvement is needed to constitute excessive entanglement with religion or when human life begins for purpose of analysis in abortion cases, does the form of the questions invite value judgments or discovery of objective standards?

Other questions present themselves. When judges attempt to discover the meaning to the term "religion", how do they avoid circularity? If their objective is to identify and declare the essential elements of religion, does not this presuppose some preliminary knowledge of the subject? The definition once formulated, is it the word "religion" or a concept or a thing which is signified? Is the end product a nominalistic, conceptualistic, or realistic definition, and is this a matter of import in the legal field?

Ludwig Wittgenstein a noted philosopher of linguistics, looks upon a definition as a device to teach someone how to use a word in the context of a particular language. However, according to Friedrich Waismann the renowned mathematician, definition is also a type of description. He insists, that it is an incomplete description because there is always the possiblity of the emergence of something new and for him this possibility is always present. Additionally, G. K. Ogden views all definitions as being essentially ad hoc. The applicability, he contends, is restricted and whenever a term is taken outside the universe of discourse for which it has been defined, it becomes a metaphor that may be in need of fresh definition.

Closely related to the purpose of a definition is the definition's use. When the question is asked, what is religion, are we asking for a theory of how we use the concept or are asking for the conceptual commitment our use entails?

When the Court raises the problem as it did in a leading conscientious objector case, United States v. Seeger, whether a given belief that is sincere and meaningful occupies a place in the life of the possessor parallel to that filled by the orthodox belief in God, the Court is not asking for linguistic information about the present and proper use of the words "sincere belief" or "orthodox belief". The problem for the Court in that particular case revolved around the open texture of the concept "religion". The Court was faced with a situation in which there was no established correct usage. There were no linguistic rules ready to tell whether a sincerely held belief was or was not legal religion.

A different problem of usage arises once a word has been judicially defined, that is legal use or usage is not always ordinary usage. It has been characterized as being curious, idiosyncratic, and peculiar. It is influenced by standards by which facts or relevancy are introduced; legal theory; by the ambiguous concept of ratio decidendi that can be translated into either a reason for deciding or a reason for decision; by obiter dictum which means saying something by the way; by the doctrine of stare decisis; by the norms for decisions; by the logical structure of legal doctrine; by the language of law; by which he judges his own presuppositions and assertions; and by the requirement that a decision must be rendered.

An inquiry into the essence or nature of religion is simply a search for a definition of a word. Since the word essence seems to refer to a matter of empirical fact, it too can cause confusion in the way that it is used. A scientific theory is a formula for correlating the facts of experience. Legal theory, on the other hand, is not a statement of fact, it is merely an expression of an idea. Legal theory is value-ridden; it speaks of what the law ought to be rather than what the law is.

Classical legal theory attributable to Justice John Marshall, places a constitutional duty on the judiciary to say what the law is - that is, to exercise its own independent discretion in finding, interpreting, and applying law whenever the decision of a case and controversy demands it.

The word discretion may be used in various ways, but when it is said that judges exercise discretion, this generally means that they have decisions to make regarding which rule of law is applicable to the facts at hand or whether to amend an old rule or write a new one. Discretion is always influenced by understood information against which it is used.

Consequently, when a judge is faced with a problem of definition, he gives meaning to a concept based on his own value system or on what he deems the law to be, or on what he believes from the facts the law outght to be. This suggests that the legal definition is arbitrary, value-ridden, and tentative because it is subject to change by the next definer if peripheral matters need to be differentiated.

A judge's choice of values is made in the light of his assessment of the good or bad in society and is thus influenced by normative considerations and conceptualizations of what should or will be done. Ideally, legal conceptualization involves precepts of uniformity, regularity and predictability and is free from arbitrariness, privilege or discrimination.

An understanding of reality and value, or, of the "is" of law and the "ought" of ethics, separately and in combination, is integral to the search for the meaning of the "good". Value designations carry a burden of justification and can be properly used only if some accepted rule exists by which their correctness can be ascertained.

"We must never forget that it is a constitution we are expounding." This admonition of Chief Justice Marshall in the historic case, McCulloch v. Maryland, is a constant reminder to students of constitutional law that the object of their study is the supreme law itself. The section of the Constitution with which this discussion deals is the provision of the First Amendment that reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.."

The first word that meets the eye is "Congress". This reference is explicit enough. A specific federal body is to make no law. Here asserted in dogmatic and absolute terms is a restraint on the legislative branch of national government. If the restraint is to be effective, then Congress may not be accorded the privilege of determining what the Amendment means. Who then has this prerogative? James Madison provided an answer when he presented the proposed Bill of Rights to the Congress. Madison's answer has been ratified by our constitutional history. In the event that there is disagreement by whay of a case or controversy with a statute of Congress' making and if there is a doubt on First Amendment grounds, the courts, therefore, as guardians and definers of individual rights, will be in a position to promulgate law.

The text of the First Amendment forbids Congress to make laws of a religious nature, but imposes no such restriction on state legislatures. Presumably the applicability of the clause was to be limited to acts of the national government. It was though by some who attended the 1789 Convention that the major responsibility for safeguarding individual rights vested with the states and that there were in effect relevant and adequate state provisions for protection. It was conceded, however, even by those who believed in the adequacy of State Bill of Rights, that where rights were not sufficiently guarded, national protection would be necessary.

Evidence supports the fact that the measure of religious liberty did vary from state to state depending on the terms of each individual expression, and that it was the intent of James Madison at least that a National Bill of Rights reach this discrepancy.

With the adoption of the Fourteenth Amendment in 1868 and its provision for restriction on state interference in the area of individual liberty, a potential vehicle was available for making effective against the states some of the provisions of the Federal Bill of Rights. A literal reading of the Amendment, however, in no way suggests that through its application, state governments could be precluded from usurping religious prerogatives. Individual liberty is a limiting or qualifying term, not an enlarging term, and it would require considerable breadth of construction on the part of the Court to read into the vague Amendment precepts of religious freedom and prohibition against a religious establishment especially when the word religion is no where in evidence. The relevant words of the Fourteenth are: "nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

In 1947, in Everson v. Board of Education, the Court argued that "no law in aid of religion" was the original meaning and intent of the phrase "no law respecting an establishment of religion". Justice Wiley Rutledge in his dissent claimed that the sole object of the Amendment was "to create a complete and permanent separation of the spheres of religious activity and its authority by comprehensively forbidding every from or support for religion."

In the following year in a brief filed for an in behalf of an appellee in McCollum v. Board of Education challenged the evidence of Everson. It was claimed that the stipulation "no aid of any kind to religion",originalityforbade only laws "respecting" an establishment of religion. "Respecting" in this context, it was argued, meant favoring or disfavoring "an establishment of." The phrase "an establishment of" meant preferential status in law for religion or the doctrines, practices, or modes of worship of a particular group.

Chief Justice Burger (Wals v. Tax Commissioner of the City of New York), contends that for the men who wrote the religion clause of the First Amendment, "establishment of religion" connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.

The popular formula for the American system of Church-State relations is "Separation of Church and State". While the formula has no legal force and none of its terms is mentioned in the First Amendment, it has attained some status as a synonym for the Establishment Clause.

In expressing what the public policy toward religion outght to be, James Madison, during the debates in Congress over the adoption of the First Amdndment, argued that "the people feared one sect might cbtain a preeminence, or two combine together and establish a religion to which they would compel others to conform". (Annals of Congress 731, 1789) It was his opinion that the purpose of the First Amendment was to prevent the prescription by Congress of a national faith, that is, a nationally established church.

The word "church" presently has a number of different meanings: In legal reference there are at least four distinct applications made of the term - (1) in the established historical sense as one that has the preferment of government, that is, one conferred with special favors and advantages which are denied to others, (2) in a universal sense as the entire body of believers of the Church - that is one universal church with each denomination being viewed as a subdision of the larger body, (3) in the particular sense as a sect, or group of believers, or cult, or a congregation; and (4) in a general sense that includes any relationship that government has with religion.

Two questions raised by the Selective Service Act definition were whether "religion" necessarily conotes belief in a "Supreme Being" and whether "Supreme Being" and "God" meant the same thing. In the case, United States v. Seeger the Court asked:

> Does the term "Supreme Being" as used (in the statue) mean the orthodox God or the broader concept, a power or being, or a faith, to which all else is subordinate or upon which all else is ultimately dependent?

The Court determined that when Seeger insisted on obeying the dictates of his conscience or the imperatives of an absolute morality, it would be impossible to say with assurance that he was not confirming to external commands in virtually the same way as was the objector who defers to the will of the traditional God.

Accordingly, the Court concluded that "Supreme Being" as used by Congress denoted a broader concept than that customarily associated with the word "God" and held that Seeger would qualify for the religious exemption if his beliefs occupied a place in his life parallel to that filled by more traditional concepts of "God" in the lives of orthodox believers. The Court in Seeger avoided the issue of establishment by asserting that Seeger's nontheistic beliefs were within the statutory definition of religion. Seeger was an agnostic and he believed that the existence of God cannot be proved or disproved, and the essence of his nature cannot be determined. In 1967 the words "Supreme Being" were deleted from the new Military Selective Service Act, probably as a reaction to the Court's expanded meaning of religion in Seeger.

Although the First Amendment speaks of "no law respecting an establishment of religion..." and no law "prohibiting the free exercise thereof..." the key words of these clauses have generally been employed to enunciate distinct constitutional concepts. "Free exercise" as exemplified by the cases tends to forbid judicial determination of whether an asserted religion is factually religious. This clause is concerned with laws whose primary effect tends to disfavor a claimed religion. "Establishment" on the other hand, tends to favor rather than disfavor a particular religion. Generally involved in establishment claims are civil regulations that suggest some commonly understood notion of religion. Both clauses of the Amendment relate to freedom of religion and have been declared applicable to the states through the due process clause of the Fourteenth Amendment. Any protection given in the name of religion under the clauses will depend, of course, on what the Court deems religion to be.

The current teaching of the Supreme Court on the meaning of religion in the Constitution is a mixture of tradition and change. The conventional concept of religion - a systematic body of doctrinal, ethical, and ceremonial elements related to the place of the Supreme Being in the life of man has continued to be central. This combination of dogma, ritual, and moral rules is commonly referred to as a faith and a group of persons sharing a faith is usually called a church. There has not been nor is there today any question of whether a faith or a church is religious in the constitutional sense. Individual persons professing a faith or claiming membership in a church enjoy the protection of both of the Religion Clauses. And, corresponding to the protection of churches and individual believers is that of persons or groups who choose not to join a church or accept any

religious guidelines. The freedom not to embrace a religion is itself a religion stand protected by the First Amendment.

On the other hand, Religion Clause cases, especially since World War II, have combined to produce an expanded meaning of religion. Suits seeking to enlarge the area of constitutionally protected religious freedom have resulted in the Seeger formula according to what is regarded as religion is related to the Ultimate Concern in a person's hierarchy of values and is a sincere and meaningful belief occupying a place in the life of the possessor parallel to or retain state benefits for religious interests or eliminate state support of religion, expanded the meaning of religion in the establishment area.

The traditional and recent teaching of the Court combine to provide the makings of a descriptive definition which is related by doctrinal, ethical or ritualistic considerations to the Ultimate Concern (identified as God, Nature, Humanity, etc.) in the life of an individual or group; the belief or faith to which all else is subordinate and which occupies in the life of its possessor a place parallel to that filled by the orthodox belief in God, givening fundamental meaning to life and dictating standards of belief, conduct, or worship.

Whatever verifies the terms of this description is entitled to protection under the Free Exercise Clause and, by the same token, is disqualified from governmental assistance by the Establishment Clause.